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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 351

GRACE LINE INC., *Petitioner*

v.

NATIONAL MARINE ENGINEERS' BENEFICIAL ASSOCIATION, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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v.

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioner prays that a writ of certiorari issue to review an order of the Court of Appeals of the State of New York, entered in the above-entitled case on May 7, 1964. This order denied petitioner leave to appeal an order of the Appellate Division of the Supreme Court of New York, First Department, which affirmed an order of the Supreme Court of New York (New York County—Special Term, Part I). Relying

exclusively on New York statutory and decisional law, the Supreme Court of New York confirmed an arbitration award which required petitioner to pay "severance pay" amounting to as much as a year's salary to each of ten marine engineers where, indisputably—

(1) there was no "severance" of employment or diminution of job opportunities for the ten engineers but rather an uninterrupted continuance of their employment by petitioner in their same positions, and

(2) petitioner produced an *increase*, not a decrease, in the total number of marine engineers in petitioner's employ.

CITATIONS TO OPINION AND ORDERS BELOW

The order of the Supreme Court of New York (New York County) at Special Term was entered on April 17, 1963, and was accompanied by the only opinion written in this case. The opinion is reported at 38 M. 2d 909, 239 N.Y.S. 2d 293, appears at pages 99-108 of the record below, and is printed in Appendix B hereto, *infra*, pp. 11a-18a.

The order of the Appellate Division of the Supreme Court of New York, First Department, affirming the Supreme Court of New York, was entered without opinion on February 6, 1964. This order is reported at — A.D. 2d —, 246 N.Y.S. 2d 994, and is printed in Appendix B hereto, *infra*, pp. 18a-19a.

The order of the Court of Appeals of the State of New York which denied petitioner's motion for leave to appeal the order of the Appellate Division of the Supreme Court of New York, First Department, was entered without opinion on May 7, 1964. It is reported

at — N.Y. 2d —, — N.E. 2d —, and is printed in Appendix B hereto, *infra*, p. 20a.

Also included in Appendix B are the decision and award of Arbitrator Shaughnessy, dated October 3, 1962. *Infra*, pp. 2a-10a.

JURISDICTION

The order of the Court of Appeals of the State of New York denying petitioner's motion for leave to appeal the order of the Appellate Division of the Supreme Court of New York, First Department, was entered May 7, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3).

At every stage of these proceedings, petitioner has relied upon § 301 of the Labor-Management Relations Act of 1947; has asserted that the substantive law applicable to this case is "federal law, which the courts must fashion from the policy of our national labor laws" (*Textile Workers Union of America* v. *Lincoln Mills of Alabama*, 353 U.S. 448, 456 (1957)); and has argued that the "severance pay" award runs so counter to the essence of the controlling collective bargaining agreement that it violates not only federal law but the more restrictive state rule.[1]

QUESTIONS PRESENTED

1. Whether the New York courts, ignoring all federal rules and authority, can apply to an arbitration award under the Labor Management Relations Act of

[1] Brief in Support of Grace Line's Motion to Vacate Arbitrator's Award, Supreme Court of the State of New York, County of New York (Special Term, Part I), pp. 17-21; Appellant's Points, New York Supreme Court, App. Div., First Dept., pp. 9-16, 23-24; Notice of Motion, Affidavit and Brief in Support of Motion for Leave to Appeal, Court of Appeals of New York, pp. 2, 4, 7, 9-10, 14-22.

1947 a restrictive state rule that conflicts with federal law and prevents vacatur of an award that plainly failed to draw its essence from the controlling collective bargaining agreement.

2. Whether a "severance pay" award for petitioner's engineers, rendered under the Labor Management Relations Act of 1947 and intended and designed to compensate employees for their loss of jobs or job opportunities, can be allowed to stand where:

— not a single one of petitioner's engineers lost his job, lost a job opportunity, or lost a day's wage;

— every engineer continued without interruption to work for petitioner at the same wages;

— the net effect of the change of ships was to increase by 140% the number of engineers employed by petitioner; and

— petitioner's bill of sale prevented the old ships from ever competing with American ships or taking away the jobs of American seamen.

STATUTES INVOLVED

The statutory provisions involved are § 301(a) of the Labor-Management Relations Act of 1947 (29 U.S.C. § 185(a), 61 Stat. 156) and §§ 1448-a and 1462 of the New York Civil Practice Act.[2] They are printed in Appendix A, *infra*, pp. 1a-2a.

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[2] Sec. 1462 was replaced by § 7511(b) of the New York Civil Practice Law and Rules, effective September 1, 1963. Sec. 7511(b), while not applicable to this case, is substantially similar to § 1462.

STATEMENT

In July 1959, Grace Line and the National Marine Engineers' Beneficial Association (MEBA) arbitrated into their collective bargaining agreement a severance pay plan (known as the Shipman Severance Award). This plan provided for compensation to marine engineers who lost their jobs or who would suffer loss of job opportunities by reason of the transfer of American flag ships to foreign registry.

The subject arbitration award of severance pay to ten marine engineers was made at the instance of MEBA, allegedly pursuant to the Shipman Severance Award under the collective bargaining contract.

The arbitration award grants each of ten employees severance pay of as much as a full year's wages. Yet not one of these ten employees was "severed" from his job. Not a single one lost his employment or a single day's wages. All ten employees continued to work for Grace Line. There was no severance of employment, no loss of job opportunities to any engineer employed by Grace Line or in the maritime industry generally. On the contrary, when Grace Line replaced two old vessels with two modern vessels, fourteen new marine engineers' jobs were created which had never existed before.

Apart from the failure of the New York courts to apply the paramount federal rule against this award, the notoriety and injustice of the award highlight the threat posed by this case to the efficacy of the arbitral process in achieving stability in labor-management relations generally.

Nearly 90% of the more than 100,000 labor agreements negotiated each year provide for arbitration as

the terminal point of the grievance machinery. With each passing year the number of arbitrations administered by the Federal Mediation and Conciliation Service sharply increases. In the five-year period from 1959 to 1963, this number has almost doubled, from 2,422 in the former year to 4,497 in the latter year.[3] Similar figures are disclosed by the American Arbitration Association, which docketed 2,816 cases in 1959 and 4,074 cases in 1963.[4] It has been estimated conservatively that in 1960 alone, at least 20,000 arbitration cases were heard and decided throughout the United States.[5] On the basis of these and Federal Mediation and Conciliation Service and American Arbitration Association figures, it is fair to say that as many as 25,000 arbitrations were heard and decided in 1963.

Further, arbitration is fast replacing resort to labor boards as the normal method for adjusting industrial grievances and disputes. The developing common law of labor relations is being written more by abritrators today than by official federal agencies. This conclusion is aptly demonstrated by comparing the estimated 25,000 annual arbitration awards with the less than 1,000 litigated unfair labor practice cases tried each year before the National Labor Relations Board. Arbitration, in other words, has become the chosen tribunal of most employers and unions, and is therefore exert-

[3] Federal Mediation & Conciliation Service, Annual Reports, Fiscal Years 1960-1963.

[4] American Arbitration Association, Arbitration News No. 2, 1962-1964.

[5] Herzog and Stone, "Voluntary Labour Arbitration in the United States", LXXXII International Labor Review, No. 4, October 1960, p. 302.

ing an important influence on the American economy. Fleming, *Reflections on the Nature of Labor Arbitration*, 67 Mich. L. Rev. 1245 (1963).

The foregoing figures demonstrate the scope and the weight of public reliance on arbitration as a quick, convenient and fair non-judicial means of settling disputes. How the scope of that public reliance can be narrowed and its weight markedly decreased—to the detriment of the public and the thousands upon thousands of participants in arbitration each year—is demonstrated by the specific facts of this case.

Grace Line operates a fleet of about 23 ships on three trade routes from American to Caribbean and South American ports (35-36).[6] In order to continue to receive an operating differential subsidy from the United States, Grace Line was required to replace two obsolete, 25-year-old passenger ships. In 1956, construction was commenced on two new ships, the Santa Rosa and Santa Paula, as replacements for the obsolete vessels. The two new ships went into service in place of the old ships on June 12 and October 9, 1958, respectively.

Each of the obsolete ships carried five engineers, or a total of 10 engineers on both ships. The new ships carried 12 engineers each, or a total of 24 engineers. The same ten engineers assigned to the old ships were transferred to the new ships without any interruption in their employment or compensation and without any effect upon their seniority. Thus, 14 new marine engineer jobs were created on the placing of the new ships in service (39-41).

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[6] Numbers in parentheses not otherwise identified are to folios in the "Papers On Appeal From Order," certified to this Court.

In June, 1958, MEBA and the industry, including Grace Line, began negotiations on a severance pay plan to compensate a marine engineer "who has permanently lost his position by reason of the transfer or sale of his vessel to foreign registry" (43). If the parties were unable to reach agreement, the matter was to be submitted to an arbitrator whose decision was to constitute the agreement of the parties on the subject (42).

The parties were unable to agree by negotiation. Therefore, on November 5, 1958, MEBA and the industry submitted the matter to arbitrator Mitchell Shipman. The parties defined in writing the issue to be determined by the arbitrator:

> The issue of incorporating into the agreement a clause embodying the general principle that some severance allowance should be made in the case of an engineer who has permanently lost his position by reason of the transfer or sale of his vessel to foreign registry. [48-9]

The Shipman decision and award created a severance pay plan which is now the collective bargaining agreement between the parties (Exhibit D, 124-159). In defining the limits of his authority, Shipman clearly stated:

> The provision in question relates to a *severance* allowance in the case of an engineer *who has permanently lost his position* by reason of the transfer or sale of his vessel to foreign registry. [130-131; emphasis added.]

Shipman's emphasis on the loss of jobs and loss of job opportunities is further manifested throughout his opinion by such expressions as:

> . . . a serious situation of *sharply decreasing job opportunities* for the bargaining unit employees . . . . [132]
>
> specific engineers who have *lost* their jobs . . . . [134]
>
> . . . *displaced* engineers . . . . [134, 145]
>
> . . . engineers who have *permanently lost their positions* . . . . [136]
>
> . . . serious *loss of job opportunities* for the employees . . . . [138]
>
> . . . *permanent loss* of a job . . . . [143]
>
> . . . *displaced* worker . . . . [143-144]
>
> . . . *decreased job opportunities* resulting from the transfers to foreign registry. [147; emphasis added throughout.]

That Shipman was devising a method of compensating those who had lost jobs or job opportunities is manifest by the award itself, which reads as follows:

> Whenever a Company transfers a vessel to foreign registry, it shall give *severance pay* to the regular licensed engineers assigned to such vessel. [150; emphasis added.]

The above part of the award and the language which follows it use the words "severance pay" no less than six times (150-154).

The submission to Shipman contemplated that he would mold a severance pay provision which would become an integral part of the collective bargaining agreement between the parties. It is undisputed that the Shipman Severance Pay Plan (124-59) was incorporated into the contract in effect at that time as well as in the later, successor contract now in effect.

After lying idle in the shipyard for three years, the two obsolete ships were sold to a foreign country for their scrap value (61). The bill of sale prohibited the use of the ships in any American ports forever (62), thus obviating any possibility that at some future date these ships could compete with American ships or take away the jobs of American seamen. MEBA claimed severance pay when the old ships were sold. The matter was referred to Arbitrator Donald F. Shaughnessy, who on October 3, 1962, granted MEBA's claim. In so doing, he expressly found as a fact that Grace Line's conduct caused neither severance nor loss of job opportunities anywhere in the industry and further that

> . . . two new vessels brought into operation do provide the licensed engineers with more job opportunities than were lost by the sale and transfer of the old ships. [99]

Grace Line moved in the Supreme Court of New York, New York County, to vacate the Shaughnessy award. MEBA cross-moved to confirm it.

In the only opinion written by the New York courts in this case, the Supreme Court of New York denied Grace Line's motion and granted MEBA's cross motion. At both the beginning and the end of its opinion, the Court made it abundantly clear that although the award was unjust and unreasonable, the Court considered itself powerless to overturn it under New York law:

> The court reaches the conclusion here stated with the utmost reluctance, for it permits an anomaly —confirmation of an award of severance pay to licensed ship engineers who have remained continuously and still are in the employ of the very

steamship line which under the award must give them the "severance pay."

* * * * * * * * *

Though the court, therefore, may not disturb the award, it cannot withhold voicing its profound regret that MEBA has pressed the demand for severance pay. Allowance of severance pay where, not alone has there been no loss of either jobs or job opportunities, but new jobs have come into being through the entry into service of the new S.S. Santa Paula and S.S. Santa Rosa, runs counter to one's sense of fairness. The award renders a disservice to the cause of both arbitration and collective bargaining. The satisfaction MEBA may take in the temporary advantage it has gained should be tempered by recognition that such seeming victories are bound in the end to be self-defeating. [Pp. 11a, 17a-18a, Appendix B.]

The Court relied solely upon New York statutory and decisional law. Not a single word was said about the applicability of federal law. Not a single reference was made to this Court's decisions in this field, or to any other federal decision.

Neither the Appellate Division in affirming the order below, nor the Court of Appeals of New York in denying review, rendered any opinion.

REASONS FOR GRANTING THE WRIT

1. The New York courts erroneously applied state law to the exclusion of conflicting federal law which, in this area of enforcement of labor-management contracts, is paramount. By applying state law, the New York courts considered themselves bound to affirm an award that contradicted the intent and essence of the controlling collective bargaining agreement and there-

fore violated § 301(a) of the Labor Management Relations Act.

In 1957, this Court held in *Textile Workers Union of America* v. *Lincoln Mills of Alabama*, 353 U.S. 448, that the substantive law to be applied in suits under § 301(a) to enforce an arbitration agreement is federal law, which the courts must fashion from our national labor policy. State law may be resorted to only if it is compatible with federal policy, and in any event the state law is absorbed as federal law rather than creating an independent source of rights.[7]

In 1960 this Court decided three cases involving the United Steelworkers of America which have come to be known as the "Steelworkers Trilogy". *United Steelworkers of America* v. *American Mfg. Co.*, 363 U.S. 564; *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574; and *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593. These land-mark decisions not only reduced the power of the courts to inquire into the arbitrability and merits of disputes before arbitrators, but also increased arbitrators' direct responsibility to their trust and function.

In the *Enterprise Wheel* case, the Court set forth specific limitations on the power of arbitrators:

> . . . an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the

[7] See also *General Electric Co.* v. *Local 205*, 353 U.S. 547 (1957).

> arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award. [363 U.S. at 597.]

Two years later, this Court held in *Charles Dowd Box Co.* v. *Courtney*, 368 U.S. 502 (1962), that suits under § 301(a) for violations of a contract can be brought in either state or federal courts. And in the same year, the Court reaffirmed this principle but made it explicitly clear that regardless of where the suit was brought, "incompatible doctrines of local law must give way to principles of federal labor law." *Local 174* v. *Lucas Flour Co.*, 369 U.S. 95, 102 (1962). In so ruling, the Court noted that all of the state courts that had assumed § 301 jurisdiction had either explicitly considered the problem of state versus federal law or had at least carefully considered federal precedents. (*Id.* at 102-103 n. 10).[8] Only last Term this Court again held that the substantive law controlling a suit to compel arbitration is federal law, fashioned from national labor law policies. *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543 (1964).

In brief, regardless of where the suit is brought, the arbitrator cannot be considered the final, omnipotent dispenser of industrial justice. He is not free to make his own rules. His award must relate to the collective bargaining agreement. It cannot be made as though that agreement did not exist; it must "draw its essence" from that agreement.[9] If an arbitrator (with-

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[8] See also *Smith* v. *Evening News Ass'n.*, 371 U.S. 195, 199 (1962).

[9] That arbitrators generally regard the Steelworkers Trilogy as increasing their responsibility is obvious from their comments. See, *e.g.*, Smith, *Arbitrability—The Arbitrator, the Courts and the Parties*, 17 Arbitration Journal 3 (1962); Levitt, *The Supreme*

out regard to motive, intent or criminality of purpose) fails to draw the essence of his award from the collective bargaining agreement, this Court has imposed an obligation upon both state and federal forums to refuse to enforce the award. This is the federal rule.

What is the New York rule which was applied in this case?

The statute, § 1462 of the New York Civil Practice Act, has been held by the New York courts to define their power to vacate arbitration awards. This procedural state statute derives from, and is substantially similar to, a statute originally enacted in 1920. No significant change has been made in the procedural limitations on vacatur since the original adoption of these statutory limitations in 1920.

Subsequent as well as prior to the Steelworkers Trilogy, the New York courts have applied as their guide in vacating arbitration awards the tests set forth in § 1462 of the New York Civil Practice Act, such as corruption, fraud, undue means or a perverse or irrational construction attributable to one or more of the specific acts of misconduct specified in the Act. *E.g.*, *National Cash Register Co.* v. *Wilson*, 8 N.Y. 2d 377, 171 N.E. 2d 302 (1960); *Matter of S & W Fine Foods, Inc.* v. *Office Employees International Union*, 8 A.D. 2d 130 (1st Dep't 1959), *aff'd mem.* 7 N.Y. 2d 1018, 166 N.E. 2d 853 (1960). Each of these decisions—the one issued five months after the Trilogy and the other

Court and Arbitration, 14th Annual NYU Conference on Labor, 217 (1961). They have, for example, described their own responsibility as that of performing "the task which the particular parties who have employed them had in mind" (Smith, *ibid.*), and of looking "primarily to the intention of the parties in the collective bargaining agreement" (Levitt, *ibid.*).

three months before—is practically identical in two significant respects:

(1) Each decision equated a "completely irrational construction" or a "perverse misconstruction" of the collective bargaining agreement with the specific classes of misconduct referred to in § 1462; and

(2) Each opinion held in almost exactly the same words that the award could not be set aside because the arbitrators in each case were "not chargeable with misconduct" under § 1462.

The New York rule, therefore, has been the same since the Trilogy as it was before, namely, that enforcement of an arbitrator's award can be refused by the courts only where the arbitrator can be proved guilty of quasi-criminal conduct or misfeasance.

This rule was obviously followed in this case. MEBA argued to the New York courts, *inter alia*, that state law applied to this case and that Grace Line, having chosen the state forum, "cannot now complain of the application of the State law" [10]—an argument plainly at odds with this Court's decision in such cases as *Lucas Flour Co., supra*, where the company brought suit in a state court and federal law was nevertheless held to apply.[11] The New York courts apparently adopted MEBA's erroneous argument. Unlike the many state courts noted by this Court in its *Lucas Flour Co.* opinion, the New York Supreme Court cited no federal authorities whatever. Instead, it relied upon two sections of the New York Court Practice Act

[10] Respondent's Brief, New York Supreme Court, App. Div., First Dept., pp. 6-10, 11.

[11] See also *Humphrey* v. *Moore*, 375 U.S. 335, 343-344 (1964).

and four New York decisions[12] and thus felt itself legally prohibited from overturning this award. It is significant in this regard that the New York Court of Appeals has not vacated a single award by a labor arbitrator in 15 years.

The federal courts, on the other hand, have not hesitated since the Trilogy to set aside awards where arbitrators have done violence to the language and intent of the controlling bargaining agreements.

An example is *Textile Workers Union* v. *American Thread Co.*, 291 F. 2d 894 (4th Cir. 1961), where the Court of Appeals, after reviewing the Trilogy, set aside an award with this language:

> We are not persuaded that the Supreme Court, in recent cases involving arbitration and the right to enforcement of arbitration agreements, intended that the courts should permit an arbitrator to render decisions which do such violence to the clear, plain, exact and unambiguous terms of the submission and the contract of the contending parties. [*Id.* at 899.]

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[12] One of these cited decisions, *Matter of Spectrum Fabrics Corp.*, 285 App. Div. 710 (1st Dept.), *aff'd without opinion*, 309 N.Y. 709, 128 N.E. 2d 416 (1955), cited with approval the case of *International Association of Machinists* v. *Cutler-Hammer, Inc.*, 297 N.Y. 519, which was specifically overruled by this Court in *United Steelworkers of America* v. *American Mfg. Co., supra*, 363 U.S. at 566-567. Despite this Court's ruling, the New York Courts continued to apply the *Cutler-Hammer* doctrine until 1962, when the New York Legislature passed § 1448-a of the Civil Practice Act (set forth in Appendix A). The New York Law Revision Commission stated that the purpose of the statute was to change the *Cutler-Hammer* doctrine so that ". . . the New York law should be brought into harmony with the federal law." N.Y. Leg. Doc. (1962) No. 65 (F).

Similarly, in *Local 791, International Union* v. *Magnavox Co.*, 286 F. 2d 465 (6th Cir. 1961), the Court cited the Trilogy and set aside an award on the ground that the arbitrator had in effect added to the terms of the contract which governed the arbitration.[13]

The refusal of the New York courts to recognize federal law in this vital area is of great importance not only to litigants but to the harmony of our national labor policy. There are very practical differences between the state and federal rules. The federal rule would refuse enforcement to an award which fails to draw its essence from the collective bargaining agreement, *i.e.*, where the arbitrator, without any relation or reference to the agreement, dispenses "his own brand of industrial justice". *United Steelworkers of America* v. *Enterprise Wheel & Car Corp., supra*, 363 U.S. at 597. In the federal context, therefore, the arbitrator's award can be set aside without reference to motive, intent or criminality. The sole test is objective and simple: application of the essence of the collective bargaining agreement.

The New York rule, on the other hand, permits vacatur only where the arbitrator is so fraudulent, corrupt, biased, or otherwise tainted in his approach that

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[13] See also two additional decisions setting aside arbitration awards: *Taft Broadcasting Co.* v. *Columbus-Dayton Local*, 297 F. 2d 149, 153 (6th Cir. 1961) ("The fact that the dispute is arbitrable does not mean that the arbitrator may go beyond the limits of the collective bargaining agreement or ignore any collateral agreement . . . . He may not 'dispense his own brand of individual justice.' . . . "); *Local 453, International Union* v. *Otis Elevator Co.*, 201 F. Supp. 213, 218 (S.D.N.Y. 1962) ("However inviolable the teaching that courts keep their hands off arbitration awards, they are not edicts proclaimed by divine right. Arbitrators are creatures of contract. They are no more above public law than the parties from whom they derive their powers").

he has produced an award which is a perverse misconstruction or completely irrational construction of the agreement.

New York courts limit themselves to vacating awards only where the arbitrator is guilty of quasi-criminal conduct or misfeasance. This is the practice followed before the Trilogy and after the Trilogy. In consistently refusing to extend the arbitrator's responsibility beyond their own definition of their statutory power, the New York courts have thrown the New York rule directly into conflict with the federal rule.

2. The "severance pay" award in this case was so perverse that it must be set aside regardless of what law is applied.

There can be no question but that Shipman clearly intended to devise an award that would grant severance pay to workers who lost their jobs or job opportunities; otherwise, his repeated references to "permanently lost" positions (130-131, 136), "loss of" and "decreased" job opportunities (138, 147), "displaced" workers (143-144), etc., lose all semblance of meaning. His award itself, by the use of the words of art, "severance pay," carried his intention into formal language. The parties certainly contemplated an agreement that related to lost positions, because the original negotiations had revolved about a marine engineer "who has permanently lost his position" (43). Yet the Shaughnessy "severance pay" award was made applicable where:

> —not a single engineer lost his job, lost a job opportunity, or lost a day's wage;
>
> —every engineer continued without interruption to work for the same employer at the same wages;

—the net effect of the change of ships was to increase by 140% the number of engineers employed by the company; and

—the company's bill of sale prevented the old ships from ever competing with American ships or taking away the jobs of American seamen.

The arbitrator (a non-lawyer) not only failed to draw his award from the essence of the collective bargaining agreement; he flouted the agreement and issued an award that ran directly counter to the agreement's language and to the intent of the parties. Such an award cannot stand, regardless of which forum is used or which law is applied for purposes of review.

CONCLUSION

Grace Line does not argue with, nor seek to set aside, the established rules of law giving arbitrators full power properly to determine the merits of all questions before them without judicial restraint.

However, it is important that public confidence in the arbitral process be preserved by providing for judicial correction of arbitral abuse and irrational awards. Unless judicial correction is available for such determinations as this one, the arbitration process, so necessary to the full development of industrial justice, is in danger. If the parties are to be encouraged to arbitrate their labor disputes, they must be sure that at least minimal safeguards are available and that they are not at the complete mercy of arbitrators who substitute their own concepts for the essence of collective bargaining agreements entered into by the parties.

The decision of the arbitrator in this case has shocked the public conscience. It is difficult for any-

one—mariner, labor official, or casual observer—to understand that severance can be paid as a bonus not only when no one has been affected by any conduct of the employer, but further where the employer's action has increased the number of jobs available in the industry. The New York Times summed up the public view in an editorial which appeared on October 18, 1962, which was placed in the record (Exhibit B, 112-116), and which is set forth in full in Appendix C to this petition, *infra*, p. 21a.

The courts below felt that because the document before them was an arbitration award, they were compelled to enforce it despite the fact that it ". . . runs counter to one's sense of fairness" and "renders a disservice to the cause of both arbitration and collective bargaining". (321-22). But courts are far from powerless to correct arbitral abuses, and this Court has so stated.

The determination below should be reversed, and the Shaughnessy award vacated.

Respectfully submitted,

ALFRED GIARDINO
LORENZ, FINN & GIARDINO
165 Broadway
New York 6, New York
Counsel for
Grace Line Inc.

Of Counsel:

E. BARRETT PRETTYMAN, JR.
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800 Colorado Building
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APPENDIX A

Sec. 301(a) of the Labor-Management Relations Act of 1947 (29 U.S.C. § 185(a), 61 Stat. 156):

> (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Sec. 1448-a of the New York Civil Practice Act, effective April 9, 1962:

> Arbitrability not to depend upon merits of claims. In determining any matter arising under this article, the court or judge shall not consider whether the claim with respect to which arbitration is sought is tenable, or otherwise pass upon the merits of the dispute.

Sec. 1462 of the New York Civil Practice Act:

> Motion to vacate awards. In either of the following cases, the court must make an order vacating the award, upon the application of any party to the controversy which was arbitrated.
>
> 1. Where the award was procured by corruption, fraud or other undue means.
>
> 2. Where there was evident partiality or corruption in the arbitrators or either of them.
>
> 3. Where the arbitrators were guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
>
> 4. Where the arbitrators, or other persons making the award exceeded their powers, or so imperfectly executed them, that a mutual, final and definite award upon the subject-matter submitted was not made.

5. If there was no valid submission or contract, and the objection has been raised under the conditions set forth in section fourteen hundred fifty-eight.

Where an award is vacated, the court, in its discretion, may direct a rehearing either before the same arbitrators or before new arbitrators to be chosen in the manner provided in the submission or contract for the selection of the original arbitrators and any provision limiting the time in which the arbitrators may make a decision shall be deemed applicable to the new arbitration and to commence from the date of the court's order.

Where the court vacates an award, costs not exceeding twenty-five dollars and disbursements may be awarded to the prevailing party; and the payment thereof may be enforced in like manner as the payment of costs upon a motion in an action.

APPENDIX B

Arbitrator's Decision

IN THE MATTER OF

The Arbitration between GRACE LINES, INC., and NATIONAL MARINE ENGINEERS' BENEFICIAL ASSOCIATION

This is the second of two issues presented to the undersigned, as Arbitrator, for final and binding decision. The opinion and the award on the first issue was decided on 22 August 1962. The issue to be considered here involves a claim for severance pay allegedly arising under an arbitration award dated 9 July 1959. This claim arose as the result of the sale and transfer by the Company of two of its vessels to foreign registry, the *S.S. Santa Paula* and the *S.S. Santa Rosa.*

The agreement between the Company and the Union which became effective 16 June 1958 incorporated for the first time a clause referring to a severance pay program. Section 43(c) of that agreement provided for further negotiations and prospective arbitration and stated:

> The issue of incorporating into the agreement a clause embodying the general principle that some sev-

erance allowance should be made in the case of an Engineer who has permanently lost his position by reason of the transfer or sale of his vessel to foreign registry. If this issue is submitted to arbitration, the Arbitrator shall consider first whether a severance pay program is suitable and practical for the industry, and, if in the affirmative, then he shall determine the basic provisions for a suitable and practical severance pay plan which shall have as one factor the length of continuous service of the employee affected.

On 11 June 1958 the *S.S. Santa Paula* went into laid up status. Almost four months later, on 8 October 1958, the *S.S. Santa Rosa* entered laid up status.

Following agreement on the above clause, an arbitration proceeding was held on a severance pay claim. This proceeding began in November, 1958 and Arbitrator Shipman handed down his award on 9 July 1959. By its terms, this award was made applicable to the transfer or sale of any vessel to foreign registry which took place following the commencement of the arbitration proceeding.

The *S.S. Santa Rosa* was sold and transferred to foreign registry on 4 April 1961 and the *S.S. Santa Paula* was sold and transferred to foreign registry on 20 July 1961.

During the period the vessels were in laid up status, the Company employed three licensed engineers, who were members of the Union, aboard each vessel. And during this period the Company made contributions on behalf of these employees, as required by the then outstanding collective agreement, to the Union's Pension and Welfare Plan and the Union's Vacation Plan. An official from these plans testified that in no case do the plans accept contributions from a Company unless such Company has a collective agreement with the Union and then only in behalf of the employees covered by such agreement. Furthermore, the plan official stated that the engineers referred to above for whom the contributions were made by

the Company did, in fact, receive the benefit set forth in the several plans.

During this same period, namely the period the vessels were in laid up status, the Company testified that it considered putting them in the Cuban trade but that the sudden change in government in Cuba made this an unlikely prospect.

Sometime between July and September 1961 the Company and the Union executed a new agreement which was made effective as of 16 June 1961 and this new agreement incorporated as one of its provisions the terms and conditions of the Shipman Award.

A Union official testified that prior to the ratification of the agreement which became effective 16 June 1961, the Company notified the Union that it did not consider the *S.S. Santa Rosa* and the *S.S. Santa Paula* to fall within the terms and conditions of the Shipman Award. The Union official testified that because the Company adopted this position, the Union refused to ratify the agreement until and unless the Company agreed to consider both vessels as being within the terms and conditions of the Shipman Award. The Union official further testified that the Company so agreed but with the understanding that the Company retained the right to offer any defense against the claims for severance. This testimony was not contradicted by the Company.

In its defense, the Company contended that neither the agreement effective 16 June 1958 nor the agreement effective 16 June 1961 are applicable in any respect to the *S.S. Santa Paula* since that vessel entered laid up status on 11 June 1958. Furthermore, the Company contended that the terms and provisions of the Shipman Award cannot be considered applicable to either the *S.S. Santa Paula* or the *S.S. Santa Rosa* since both vessels were in laid up status prior to the issuance of the Award.

The Company also argued that even if the terms and conditions of the Shipman Award were made applicable to these two vessels, in view of the fact that none of the last regularly employed engineers aboard the *S.S. Santa Paula* or the *S.S. Santa Rosa* severed their employment relationship with the Company, the Union claim must be denied.

And finally, the Company held that the Shipman Award should not be made applicable to this situation in which the Company brought into operation two new vessels to replace the two vessels sold and by doing this more than doubled the number of jobs available to licensed engineers.

The Union, on the other hand, maintained that the *S.S. Santa Rosa* and the *S.S. Santa Paula* must be considered to fall within the provisions of the agreement which became effective 16 June 1958 as well as the agreement which became effective 16 June 1961. In addition to such facts as the employment of licensed engineers aboard the vessels during the period they were in laid up status, the contributions made to the various plans on behalf of these engineers, the continuing consideration by the Company of the possible reactivation of the two vessels and the agreement made by the Company and the Union as a condition for the ratification of the 16 June 1961 agreement, the Union pointed to several provisions of the 16 June 1958 agreement which covered vessels while in laid up status to show that the *S.S. Santa Paula* and the *S.S. Santa Rosa* were, in fact, covered by the aforesaid collective agreements. (Sections 1, 27 [a], 27 [b], 29 [2] and 29 [8].)

Further, the Union argued, the terms and conditions of the Shipman Award are specifically applicable for the benefit of the permanent engineers assigned to the vessels immediately prior to their lay up, regardless of whether or not they continued in the employ of the Company. And, said the Union, the fact that the two new vessels provide in total more jobs than on the two vessels sold, is completely irrelevant. In support of this contention, the Union cited other awards by Arbitrator Shipman.

The issues presented to the Arbitrator in this matter would appear to be as follows:

1. Are the agreements which became effective 16 June 1958 and 16 June 1961 applicable to the *S.S. Santa Paula?*

2. Assuming that both agreements are applicable, nevertheless, is the Shipman Award applicable to either the *S.S. Santa Paula* or the *S.S. Santa Rosa* in view of the fact that they were in laid up status prior to the issuance of the award?

3. Assuming that the two vessels are subject to the terms of the Award, do the facts in this particular matter prohibit the applicability of the terms and conditions of the Award?

On the basis of the several provisions of the 16 June 1958 agreement and the 16 June 1961 agreement cited by the Union, it appears that the *S.S. Santa Paula*, though in laid up status from 11 June 1958, nevertheless was covered by said agreements. These provisions are specifically addressed to vessels which are in a laid up status. This conclusion is supported by the action of the Company in making contributions to the several Union plans on behalf of the licensed engineers employed during the laid up status period. Further, the agreement between the Union and the Company as a condition precedent for the ratification of the 16 June 1961 agreement would definitely place the *S.S. Santa Paula* and the *S.S. Santa Rosa* under the 16 June 1958 and the 16 June 1961 agreements. It appears clear that the understanding reached at such time preserving the defenses of the Company did not include any defense that the *S.S. Santa Paula* was not under said agreements. Otherwise, the understanding would have been meaningless.

Though the *S.S. Santa Paula* and the *S.S. Santa Rosa* were laid up prior to the issuance of the Shipman Award,

these two vessels were certainly subject to its provisions. The Shipman Award was expressly made applicable to all vessels sold and transferred to foreign registry subsequent to the commencement of that proceeding. As previously stated, that proceeding began in November 1958. The award, dated 9 July 1959, reads, in part: "A transfer of vessel shall include any disposition thereof regardless of whether (a) it occurs when the vessel is in active operation or *in a laid up status.*" (Italics supplied.)

Thus, the first two issues set forth above are answered in the affirmative.

There remains the question of whether or not, under the facts in this particular matter, the transfer and sale of the two vessels in question fall within the terms of the Shipman Award.

If this dispute was being presented to this Arbitrator as a *de novo* matter, the facts set forth by the Company would be most cogent. As stated by the Company, and not disputed, the two new vessels brought into operation do provide the licensed engineers with more job opportunities than were lost by the sale and transfer of the *S.S. Santa Rosa* and the *S.S. Santa Paula.* Furthermore, the engineers employed on the vessels which were sold all continued in the employ of the Company.

It may well be that under such circumstances severance pay would not be granted if the issue were being submitted to arbitration as one of first impression.

However, that is not the issue before this Arbitrator. The question here is whether the terms of the Shipman Award apply to the engineers last regularly assigned to the *S.S. Santa Paula* and the *S.S. Santa Rosa* preceding their transfer to foreign registry. Whatever may have been the respective position of the Union and the several Companies (of which Grace Lines was one) before Arbitrator Shipman, his Award represents the binding decision

which became a part of the outstanding agreement between the parties to be applied but not amended or altered by this Arbitrator.

In the Shipman Award the Arbitrator specifically addressed himself to the question whether employment or an offer for employment with the same employer should be a basis for denying severance pay and the answer was in the negative. He said, in part:

> Further, in the face of the hiring hall system in operation in this industry, it would appear that an offer of a job by a Company to a displaced engineer may simply deprive another engineer of such opportunity. In the shore side analogy, such latter employee would receive the severance pay; but any such provision is, obviously impractical for maritime.

Thereafter, the same question arose in two cases and were presented to Mr. Shipman for interpretation of his Award. In the *Dolphin Steamship* case Arbitrator Shipman held:

> It is immaterial that the engineer did not retain his employment status with the Company. The need for severance pay, rests on the fact 'that a transfer of a vessel necessarily decreases the job opportunities for engineers' (Severance Pay Award p. 3). Thus, whether the licensed engineer is reemployed by the same Company on another vessel or by another Company on the date of transfer, it is, nonetheless clear that he has merely displaced another engineer. The permanent loss of employment opportunity, which is the essence of the Severance Pay Award remains unaffected.

In the Edison Steamship case, Arbitrator Shipman concluded as follows:

> The essence of his Severance Pay Award is the permanent loss of employment opportunity for the displaced engineers aboard the vessel transferred.
>
> It is true that during the lay-up period there is loss of employment. But it is only when the vessel is trans-

ferred foreign that all further opportunity for employment thereon is terminated. The right to severance pay does not vest until such transfer takes place.

Nor is it material whether a licensed engineer has obtained other employment with the same or any other company on the date of transfer. For it is clear that by so doing, he has merely displaced another licensed engineer.

Both decisions were apparently appealed to the New York State Supreme Court and were sustained.

The Shipman Award does not afford any exception to its application, where a Company which transfers a vessel to foreign registry, acquires another American flag vessel offering an equal or greater number of jobs as compared with the transferred vessel. In the absence of any such express provision, for this Arbitrator to deny the applicability of the Shipman Award because of the job opportunities made available through the new *S.S. Santa Rosa* and *S.S. Santa Paula* would be an amendment to such award which is beyond his authority.

Finally, the Arbitrator is of the opinion that insufficient evidence is in the record on the basis of which a determination can presently be made as to which specific engineers are entitled to the severance compensation and the amounts for each.

Therefore, having been duly designated as Arbitrator under the terms of the collective agreement between the Company and the Union, and having heard all testimony and read all proof, the undersigned hereby renders the following:

AWARD

1) That the claim of the Union for severance pay for the regular licensed engineers permanently assigned at the time of the last regular full voyage of the old S.S. Santa Paula and S.S. Santa Rosa preceding their respective

transfers to foreign registry, regardless of whether they were working on said vessels during said voyage, be granted.

2) That the computation of the amount due each licensed engineer shall be made in accordance with the provisions of the Shipman Award dated 9 July 1959.

3) That the computation of the exact amounts due and the determination of the specific licensed engineers who are entitled to such payments are remanded to the parties for determination and agreement by them. Should they, within three weeks from the date hereof, unless the time is extended by their mutual agreement, be unable to arrive at such computation and determination, then upon notice to him by either of them, the undersigned will set a date to hear and take further testimony and will thereafter render a further Award with respect to this issue. He is for these purposes retaining jurisdiction.

Dated: 3 October 1962

D. F. SHAUGHNESSY
Arbitrator

State of New York,
County of New York, ss.:

On this 3rd day of October, 1962, before me personally came and appeared Donald F. Shaughnessy to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

ANNA O. CUSHING
Notary Public, State of New York
(Remainder of Notary's Stamp illegible.)

Special Term Opinion

SUPREME COURT, NEW YORK COUNTY

SPECIAL TERM, PART I

Lorenz, Finn & Giardino (Alfred Giardino, C. P. Lambos, Luis M. Neeo, of Counsel) for Petitioner.

Lee Pressman (David Scribner, of Counsel) for Respondent.

HOFSTADTER, J.:

The court reaches the conclusion here stated with the utmost reluctance, for it permits an anomaly—confirmation of an award of severance pay to licensed ship engineers who have remained continuously and still are in the employ of the very steamship line which under the award must give them the "severance pay."

The petitioner, Grace Line, Inc. (Grace Line) moves to vacate and the respondent National Marine Engineers' Beneficial Association (MEBA), a union, representing licensed marine engineers, moves to confirm the award of an arbitrator, granting severance pay to ten engineers employed on two of Grace Line's ships.

On June 20, 1958, Committee for Companies and Agents, the collective bargaining agent for Grace Line and others in the industry, entered into a collective bargaining agreement with MEBA, made retroactive to June 16, 1958. The agreement provided that certain issues should be negotiated and that if agreement was not reached on any one of them by August 1, 1958, either party should have the right to have the same submitted to arbitration. Among the issues so left open was that of a severance pay program, arbitration of which was provided for as follows:

> "c) The issue of incorporating into the agreement a clause embodying the general principle that some

severance allowance should be made in the case of an engineer who has permanently lost his position by reason of the transfer or sale of his vessel to foreign registry. If this issue is submitted to arbitration, the arbitrator shall consider first whether a severance pay program is suitable and practical for the industry and if in the affirmative then he shall determine the basic provisions for a suitable and practical severance pay plan which shall have as one factor the length of continuous service of the employee affected."

The parties did not reach agreement on this issue, and it was accordingly submitted to Mitchell M. Shipman, the arbitrator named in the collective bargaining agreement. His award made on July 9, 1959, and known as the Shipman award, laid down the terms of the severance pay program, which thus became part of the 1958 collective bargaining agreement. So far as here material it reads:

"The Arbitrator does hereby determine and award that:

(1) A severance pay program is suitable and practical for the licensed engineers covered by the collective bargaining agreements between the Union and the respective Companies.

(2) The terms and conditions of the severance pay program shall be as follows:

Whenever a Company transfers a vessel to foreign registry, it shall give severance pay to the regular licensed engineers assigned to such vessel.

A transfer of a vessel shall include any disposition thereof regardless of whether (a) it occurs when the vessel is in active operation or in a laid-up status; and (b) is made directly by the Company or by the Company in an affiliate or subsidiary, which, in turn, makes the disposition to foreign registry.

The regular licensed engineers entitled to severance pay shall be the full complement of licensed engineers permanently assigned to the vessel at the time of its last regular full voyage preceding the transfer, regard-

less of whether they were actually working on the vessel during said voyage.

* * * * * *

"This Award shall be effective as of the date hereof but, shall apply to any transfer or sale of any vessel to foreign registry subsequent to the commencement of this arbitration proceeding."

The disputed claim for severance pay, upheld in the award here challenged, arises out of the decommissioning of two obsolete vessels of the Grace Line, the S. S. Santa Paula and the S. S. Santa Rosa and their later transfer to foreign registry. The S. S. Santa Paula was decommissioned on June 11, 1958, the S. S. Santa Rosa on October 8, 1958, and each vessel remained in laid-up status from the date of decommissioning until her transfer to foreign registry in April and July of 1961. The two old vessels so laid-up and eventually sold to a Greek steamship corporation were, however, replaced by new vessels of the same name. The new Santa Rosa was commissioned and placed in service on June 12, 1958, and the new Santa Paula on October 9, 1958. Thus, each of the two obsolete vessels when laid-up was immediately replaced by the new vessel which entered into active service.

The old S. S. Santa Paula and S. S. Santa Rosa were each manned by five licensed engineers; each of the new vessels employs twelve, so that the replacement by the new ships has created fourteen new jobs. While the old ships were in laid-up status the Grace Line employed licensed engineers, members of MEBA, aboard each and made contributions on their behalf, to the Union's Pension and Welfare Plan and its Vacation Plan, as required by the collective bargaining agreement. Each of the regular licensed engineers assigned to the old S. S. Santa Paula and S. S. Santa Rosa has been employed by the Grace Line without interruption ever since the vessel on which he served was put in laid-up status.

MEBA, however, asserted that since the two old vessels had in 1961 been sold and transferred to foreign registry, the engineers theretofore assigned to them were entitled to severance pay under the Shipman award. On Grace Line's refusal to make payment, the parties submitted their dispute to Donald F. Shaughnessy, the permanent arbitrator under the new 1961 collective bargaining agreement between the Committee and MEBA. His award, dated October 3, 1962, allowing the severance pay so claimed, is attacked by Grace Line as utterly irrational, contrary to the intent of the parties, and a perverse misconstruction of their agreement. Grace Line insists that an award so devoid of reason constitutes an excess of power and the type of misbehavior which justifies vacating it.

The court has already expressed its own want of sympathy with the award so denounced by Grace Line. However, as we shall see, the question whether the award should be confirmed or not does not hinge on the court's concurrence with the arbitrator's decision.

Before taking up Grace Line's main contention, it is desirable to dispose of a subsidiary argument advanced by Grace Line—that because the old S. S. Santa Paula had been withdrawn from service and her engineers transferred to the replacement vessel before the 1958 collective bargaining agreement took effect and both vessels had been so withdrawn before the July 9, 1959 Shipman award, retroactive to November 1958, the time of the commencement of the arbitration proceedings, the Shipman award cannot rationally apply to these vessels. I find this argument completely without substance. It is answered most persuasively in the Shaughnessy award, which points out that, while these two ships were in laid-up status, licensed engineers were employed aboard them and contributions made to various union plans on their behalf, and that Grace Line, besides giving continuing consideration to their possible reactivation, agreed with MEBA as a

condition of the latter's ratification of the new collective bargaining agreement effective June 16, 1961, to consider the S. S. Santa Rosa and the S. S. Santa Paula within the terms of the Shipman award, subject to its right to offer any defense against the claims for severance pay. It is significant that the new 1961 agreement incorporates the Shipman award as one of its provisions.

The Shaughnessy award rests on the prior Shipman award. The thrust of Grace Line's attack on the Shaughnessy award is that the severance pay program was, as its very name implies, intended to compensate for the loss of jobs or job opportunities and that here, not alone were the engineers who, under the award, are to receive severance pay, in the uninterrupted employ of the Line, but job opportunities were increased, not diminished, through the replacement with the two new vessels, employing fourteen more engineers. Grace Line urges that under the Shipman award two factors must concur to support a claim for severance pay: (1) loss of employment or job opportunity, and (2) transfer to foreign registry, and that if either is absent there is no tenable basis for the allowance of severance pay.

It cannot be gainsaid that the loss of employment was an important, if not a prime, consideration in the formulation of the severance pay system for this industry. The provision in the June 16, 1958 collective bargaing agreement for arbitration of the issue has the quoted reference to "an engineer who has permanently lost his position by reason of the transfer or sale of his vessel to foreign registry." The Shipman opinion, as distinguished from the award proper, has like references at various points to permanent loss of position, decreasing job opportunities and displaced employees. Yet, the award itself, already quoted, declares flatly and unequivocally, that whenever "a Company transfers a vessel to foreign registry, it shall give severance pay to the regular licensed engineers

assigned to such vessel." If makes no exceptions; it imposes no conditions. So arbitrator Shaughnessy read and applied it to the dispute submitted to him. It is manifest from his opinion that he was fully aware that the two new vessels provided the licensed engineers with more job opportunities than were lost by the sale and transfer of the old ones and that the engineers employed on the latter were not displaced, but remained in Grace Line's employ. He pointedly commented: "It may well be that under such circumstances severance pay would not be granted if the issue were being submitted for arbitration as one of first impression." It was his view, however, that the Shipman award constrained him to find as he did; his duty, he said, was to apply, not to amend or alter the Shipman award.

If arbitrator Shaughnessy's interpretation of the Shipman award stands, as I conclude it must, then Grace Line's grievance is in reality directd against the Shipman, rather than the Shaughnessy award. Yet the Committee accepted the Shipman award without question. Not alone did it not subject the award to judicial review, but it affirmatively ratified it when, as above noted, it embodied it in the 1961 collective bargaining agreement.

The doctrine that an award concludes the parties on all the issues, both of fact and of law, submitted to the arbitrator is now firmly established. *Matter of Spectrum Fabrics Corp.* [*Main St. Fashions, Inc.*], 285 App. Div. 710, aff'd 309 N. Y. 709; *Matter of S & W Fine Foods, Inc.* [*Office Employees International Union*], 8 A. D. 2d 130, aff'd 7 N. Y. 2d 1018; *Matter of Transpacific Transport Corp.* [*Sirena Shipping Co., S. A.*], 9 A. D. 2d 316, 320-321, aff'd 8 N. Y. 2d 1048; *Matter of National Cash Register Co.* [*Wilson*], 8 N. Y. 2d 377).

Perhaps the arbitrator read the Shipman award too literally; possibly another arbitrator might in construing it have given more weight to the opinion which preceded it,

and, as a result, have found that the claim for severance pay was contrary to what the parties intended and that the language of the Shipman award in such circumstances did not forbid rejection of the claim. But an award may not be set aside because others might have reached a different conclusion. As Judge Fuld said in *Matter of National Cash Register Co. (Wilson)*, 8 N. Y. 2d 377, 383-384:

> "The mere fact that a different construction could have been accorded the provisions concerned and a different conclusion reached does not mean that the arbitrators so misread those provisions as to empower a court to set aside the award. It appears clear to us that the agreement between the Company and the Union is reasonably susceptible of the construction given it by the arbitrators. Accordingly, since they acted within their powers and are not chargeable with such misconduct as is specified in section 1462 of the Civil Practice Act, the award is unassailable and, disappointing though it may be to one of the parties, must be obeyed."

The rule declared in the foregoing authorities now has statutory sanction by virtue of the declaration in § 1448-a of the Civil Practice Act, effective April 9, 1962, and, hence applicable to the present arbitration, that the court "shall not consider whether the claim with respect to which arbitration is sought is tenable, or otherwise pass upon the merits of the dispute."

Though the court, therefore, may not disturb the award, it cannot withhold voicing its profound regret that MEBA has pressed the demand for severance pay. Allowance of severance pay where, not alone has there been no loss of either jobs or job opportunities, but new jobs have come into being through the entry into service of the new S. S. Santa Paula and S. S. Santa Rosa, runs counter to one's sense of fairness. The award renders a disservice to the cause of both arbitration and collective bargaining.

The satisfaction MEBA may take in the temporary advantage it has gained should be tempered by recognition that such seeming victories are bound in the end to be self-defeating.

The motion to vacate is denied and the motion to confirm the award is granted. Settle order.

Dated: April 5, 1963

SAMUEL H. HOFSTADTER
J. S. C.

Order of Appellate Division of the Supreme Court, dated February 6, 1964

At a term of the Appellate Division of the Supreme Court held in and for the first Judicial Department in the County of New York, on the 6th day of February, 1964.

Present—Hon. BERNARD BOTEIN, *Presiding Justice.*
" CHARLES D. BREITEL,
" BENJAMIN J. RABIN,
" JAMES B. M. MCNALLY,
" SAMUEL W. EAGER,
Justices.

6886

In the Matter of the Arbitration between

GRACE LINE INC., *Appellant,*

and

NATIONAL MARINE ENGINEERS' BENEFICIAL ASSOCIATION, *Respondent.*

Affirmance of Order

An appeal having been taken to this Court by the appellant from an order of the Supreme Court, New York County, entered on the 17th day of April, 1963, denying appellant's motion to vacate the arbitrator's

award herein, and granting respondent's motion to confirm said award, and said appeal having been argued by Mr. Alfred Giardino of counsel for the appellant, and by Mr. David Scribner of counsel for the respondent; and due deliberation having been had thereon,

It is hereby unanimously ordered that the order so appealed from be and the same is hereby affirmed with $20 costs and disbursements to the respondent.

Enter,

VINCENT A. MASSI,
Clerk.

NOTICE OF ENTRY

Please take notice that the order, of which the within is a copy, made in the above-entitled action by the Supreme Court, Appellate Division, First Department, was entered in the office of the Clerk of said court on the 6th day of February, 1964.

Dated: March 2, 1964.

PRESSMAN & SCRIBNER,
Attorneys for Respondent,
30 Broadway,
New York 4, N. Y.

To:

LORENZ, FINN & GIARDINO,
Attorneys for Appellant,
165 Broadway,
New York 6, N. Y.

Order of the Court of Appeals of the State of New York, dated May 7, 1964

STATE OF NEW YORK, IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Seventh day of May, A. D. 1964.

Present, HON. CHARLES S. DESMOND, *Chief Judge, presiding.*

No. 354

In the Matter of the Arbitration between
GRACE LINE INC., *Appellant,*

and

NATIONAL MARINE ENGINEERS' BENEFICIAL ASSOCIATION, *Respondent.*

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been duly submitted thereon and due deliberation thereupon had:

ORDERED, that the said motion be and the same hereby is denied with ten dollars costs.

(SEAL) A copy

GEARON KIMBALL
Deputy Clerk

APPENDIX C

New York Times editorial of October 18, 1962 (Exhibit B, 112-116):

Labor Relations at Sea

There is new evidence that nothing is incredible in the labor relations of the maritime industry. Ten ship engineers of the Grace Line have just won an award of severance pay, even though they never lost their jobs. This is quite an achievement, even in an industry where the bargaining table sometimes appears more an instrument of destruction than a means of negotiation.

The engineers were employed on the old liners Santa Paula and Santa Rosa. When the company built two new ships and named them Santa Rosa and Santa Paula in 1958, the old ships were retired. The engineers went across the pier (presumably they walked, although possibly they were carried in palanquins by company officials) and took up their jobs on the new ships.

Now it came to pass that some time later the Grace Line succeeded in disposing of the old liners, and they sailed away abroad for registry under foreign flags. In the union demand for severance pay for the men, the arbitrator noted that a past arbitration award and the company-union contract itself established that when men were removed from their jobs by reason of their ships being sold abroad, they were entitled to severance.

The men were no longer in the jobs they had on the old ships. The old ships were sold abroad. Ergo, . . . etc. A tribute indeed to those who watch over the poor seaman, known in tradition and admiralty as 'a ward of the court' because of his innocence and helplessness.

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IN THE

Supreme Court of the United States

October Term, 1964

No. 351

GRACE LINE INC.,

Petitioner,

v.

NATIONAL MARINE ENGINEERS' BENEFICIAL ASSOCIATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENT IN OPPOSITION

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Question Presented

Whether an order of a state court confirming an arbitration award in which the arbitrator applied the precise terms of the applicable provisions of the collective bargaining agreement is incompatible with federal law.

Statement

The issue involved in this case is a narrow one, and relates simply to the question as to whether an arbitrator designated by the parties under their collective bargaining agreement exceeded his powers by making an award applying the precise terms of relevant provisions of that agreement.

In a collective bargaining agreement effective June 16, 1958 between the respondent union and a large group of shipowners including petitioner the parties agreed that

the issue of a severance pay program, if not agreed upon by the parties, be submitted to arbitration for determination as to whether such a program was suitable and practical for the industry and if so for an award determining the specific provisions of such a program (R. 61).*

Pursuant to that agreement the parties submitted the issue to Arbitrator Mitchell M. Shipman, designated as such under the collective bargaining agreement effective June 16, 1958. An arbitration award was made on July 9, 1959, the decretal provisions of which were:

> "Whenever a Company transfers a vessel to foreign registry, it shall give severance pay to the regular licensed engineers assigned to such vessel.
>
> "A transfer of a vessel shall include any disposition thereof regardless of whether (a) it occurs when the vessel is in active operation or in a laid-up status; and (b) is made directly by the Company or by the Company to an affiliate or subsidiary, which, in turn, makes the disposition to foreign registry.
>
> "The regularly licensed engineers entitled to severance pay shall be the full complement of licensed engineers permanently assigned to the vessel at the time of its last regular full voyage preceding the transfer, regardless of whether they were actually working on the vessel during said voyage" (R. 58-59).

This Shipman Award was then by agreement of the parties incorporated into the succeeding collective bargaining agreement, effective June 16, 1961, which included the petitioner as a party to such agreement. Dr. Donald Shaughnessy was designated in that agreement as permanent arbitrator for all unsettled disputes arising thereunder (R. 55).

* Numbers in parentheses refer to pages in the Papers on Appeal from Order filed by Petitioner as part of the Record.

A dispute arose between the parties herein as to whether, under the contract provision which constituted the Shipman award, certain licensed marine engineers were entitled to compensation to be computed as set forth in that agreement. Petitioner's ships on which those engineers had served had been transferred to foreign registry (R. 55). The engineers involved in the dispute had been permanently assigned to the transferred vessels at the time of those vessels' last regular full voyage preceding their transfer to foreign registry. After the transfer of the vessels to foreign registry the engineers were assigned to new vessels of petitioner (R. 62).

After extensive hearings Dr. Shaughnessy made an award in which he determined that the Shipman award as incorporated in the collective bargaining agreement required payment of severance pay compensation to these engineers (R. 30-37). He held that he was bound by the terms of the Shipman award which the parties had voluntarily incorporated in their collective bargaining agreement, and that the fact that the engineers involved had been transferred to new vessels of the petitioner did not warrant denial of severance pay to them under the terms of the Shipman award (R. 33-36). Arbitrator Shaughnessy noted that in two awards made by Arbitrator Shipman after the latter's original award on severance pay, and prior to the incorporation of the Shipman award in the 1961 agreement between the parties, Shipman had ruled that "whether the licensed engineer is reemployed by the same company on another vessel or by another company on the date of transfer, it is nonetheless clear that he has merely displaced another engineer" (R. 35), and that it is not "material whether a licensed engineer has obtained other employment with the same or another company on the date of transfer, for it is clear that by so doing, he has merely displaced another licensed engineer" (R. 35).

Having concluded that the precise conditions of the Shipman award, *i.e.*, a transfer of vessels to foreign registry

and the fact that there were regular licensed engineers assigned to such vessels, had been proven, Arbitrator Shaughnessy awarded severance pay to such engineers in accordance with the formula for compensation set forth in the Shipman Award.

Petitioner then made application to the Supreme Court of the State of New York, New York County, "for an order directing that the award made by Donald F. Shaughnessy * * * be vacated on the ground that said Donald F. Shaughnessy, the sole arbitrator herein, exceeded his powers and decided matters not submitted to him * * * " (R. 10). Petitioner there contended that "the award went so clearly beyond the intent of the parties and constituted such a perverse misconstruction of their agreement and is so divorced from rationality that it can be accounted for only by one of the kinds of misbehavior cited in law as proper grounds for vacating that award" (R. 25-26). It is apparent that petitioner relied on the provisions of New York State law which set forth the grounds upon which an award may be vacated. Petitioner did not assert Section 301 of the Labor-Management Relations Act of 1947, 61 Stat. 156; 29 U. S. C. § 185 as the basis for the action.

Respondent union made a cross-motion in the same court to confirm the Shaughnessy award, noting among other things in support of its motion:

> "The fact that the severance pay program relates to a situation where engineers' jobs are permanently lost is wholly consistent with the ultimate determination of Arbitrators Shipman and Shaughnessy. The very basis of the program is that when a ship is transferred to foreign registry every engineers' job on that ship is permanently lost to the engineers who had been assigned to the ship and to all other engineers. The acquisition by the Company of other ships and its employment of such engineers on the new ships does not change the fact that the original ships and the jobs thereon are lost forever

> to American marine engineers. The loss of such transferred ships necessarily results in a loss of job opportunities for engineers to the exact extent that the jobs on such ships are eliminated. Had the original ships not been transferred and had the Company acquired additional ships, job opportunities constantly being depleted and diminished by transfers to foreign registry, would have risen in some small degree to alleviate the constant job shrinking process." (R. 68).

Respondent also noted that whatever quarrel the company had must necessarily be with the Shipman Award which it had never contested rather than with Dr. Shaughnessy's enforcement of it (R. 69).

The Supreme Court of the State of New York denied petitioner's motion to vacate the award and granted respondent's motion to confirm. The Court stated:

> "[T]he award itself * * * declares flatly and unequivocally, that whenever 'a Company transfers a vessel to foreign registry, it shall give severance pay to the regular licensed engineers assigned to such vessel.' It makes no exceptions; it imposes no conditions.
>
> So arbitrator Shaughnessy read and applied it to the dispute submitted to him * * *. It was his view * * * that the Shipman award constrained him to find as he did; his duty, he said, was to apply, not to ignore or alter the Shipman award.
>
> "If arbitrator Shaughnessy's interpretation of the Shipman award stands, as I conclude it must, then Grace Line's grievance is in reality directed against the Shipman, rather than the Shaughnessy award. Yet the Committee accepted the Shipman award without question. Not alone did it not subject the award to judicial review, but it affirmatively ratified it when, as above, noted, it embodied it in the 1961 collective bargaining agreement." (R. 106)

While the Court expressed its "want of sympathy with the award" it held that "the question whether the award

should be confirmed or not does not hinge on the court's concurrence with the arbitrator's decision." The Court then concluded that it could not disturb the Shaughnessy award, applying the doctrine that "an award concludes the parties on all the issues, both of fact and of law, submitted to the arbitrator * * *" (R. 106).

The Appellate Division of the Supreme Court of the State of New York unanimously and without opinion affirmed the lower Court's judgment. The Court of Appeals of the State of New York denied without opinion petitioner's application for leave to appeal.

ARGUMENT

1. There is no conflict between Federal law and the law of the State of New York on the function of the Court in respect to arbitration awards. The decision of the State Court confirming the award is clearly correct whether State or Federal law applies.

The arbitration award here involved was based on the precise provisions of the collective bargaining agreement between the parties. The state courts rejected petitioner's claim that the award exceeded the powers of the arbitrator. A contrary determination would lead to the absurd conclusion that the award "exceeded the power of the arbitrator" because the arbitrator considered himself bound not to go beyond the terms of the collective bargaining agreement which was submitted to him by the parties for interpretation and application. In effect, as in most cases where a party to an arbitration does not prevail, the petitioner is simply expressing understandable disappointment, and consequent regret that it became a party to the collective bargaining agreement. In reality, petitioner sought, albeit unsuccessfully, to have the state court review the merits of the dispute and to substitute its judg-

ment for the judgment of the voluntarily agreed upon arbitrator. Petitioner now seeks to have this Court do the same.

There is no need to reach the question of whether Federal or State law should be applied since there is no conflict between the Federal court decisions involving arbitration awards and Section 1462 of the New York Civil Practice Act, as interpreted by the New York courts. This is made apparent in the extended discussion of the entire arbitration process contained in a series of three Supreme Court cases decided in 1960. *Steelworkers* v. *American Manufacturing Co.*, 363 U. S. 564; *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574; *Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593.

In *Steelworkers* v. *Enterprise*, *supra*, this Court said:

> "The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards. As we stated in *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, decided this day, the arbitrators under these collective bargaining agreements are indispensable agencies in a continuous collective bargaining process.
>
> * * *
>
> "* * * the question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his." 363 U. S. 593 at 596, 599.

See also: *International Union of Electrical Workers* v. *Otis Elevator Company*, 314 F. 2d 25 (2d Cir.) cert. denied 373 U. S. 949 (1963).

Petitioner, quoting from the *Enterprise* opinion, states the federal rule to be that "If an arbitrator * * * fails to draw the essence of his award from the collective bargaining agreement" both State and Federal courts must refuse to enforce the award.*

But then the petitioner inverts that sentence to urge that this Court thereunder requires that an award must be drawn from the essence of the collective bargaining agreement.**

The interpretation of the applicable Federal law suggested by petitioner is clearly inconsistent with the opinion of this Court in the *Enterprise* case, which clearly states that courts should not review the merits of an arbitration award. As this Court there said, the "plenary review by a court of the merits would make meaningless the provisions that the arbitrator's decision is final, for in reality it would almost never be final." 363 U. S. at 599.

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* Brief for Petitioner, pp. 13-14.

** The Court, in its effort to *uphold* the arbitrator's award in accordance with Federal labor policy, found reason to sustain an award accompanied by an ambiguous opinion because it drew its essence from the collective bargaining agreement. In other words, the award's *raison d'etre* was the collective bargaining agreement; it was not fashioned out of thin air. That is a far cry from saying that an arbitrator should ignore the plain meaning of a contract to determine its essence, and that the courts must in turn determine whether the arbitrator has culled the real essence from the agreement.

The New York rule is based on Section 1462 of the New York Civil Practice Act* which provides as one of the grounds for vacating an arbitration award: "4. Where the arbitrators or other persons making the award exceeded their powers." "* * *"

The New York rule on the vacation of arbitration awards is well stated by the New York State Court of Appeals in *States Marine Line* v. *Crooks*, 13 N.Y. 2d 296, 195 N. E. 2d 296 (1963), its latest opinion on that subject. The Court stated:

> "Our function upon this appeal—indeed, the function of any court in a proceeding such as the present—is not to decide the appropriateness, or the wisdom of the award or whether the judges of a court would have rendered the same award had they acted as arbitrators but, rather, to ascertain whether the arbitrator who did make the award exceeded his powers or so imperfectly executed them as to require its vacatur." 13 N. Y. 2d at 212.

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* Section 1462, which is applicable to the instant matter, has since been superseded by Section 7511 of the Civil Pracuce Law and Rules which did not materially change the former provisions. Section 1462 provided as grounds for vacating an award:

> "1. Where the award was procured by corruption, fraud or other undue means.
>
> 2. Where there was evident partiality or corruption in the arbitrators or either of them.
>
> 3. Where the arbitrators were guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy or of any other misbehavior by which the rights of any party have been prejudiced.
>
> 4. Where the arbitrators or other persons making the award exceeded their powers, or so imperfectly executed them, that a mutual, final and definite award upon the subject-matter submitted was not made.
>
> 5. If there was no valid submission or contract, and the objection has been raised under the conditions set forth in section fourteen hundred fifty eight."

In that case, the Court of Appeals shows its awareness of the *Lincoln Mills and Lucas Flour** doctrines when it said:

> "Since the parties herein have not suggested that the present controversy is to be decided under Federal law—on the ground that it involves a contract between an employer and a labor organization representing employees in an industry affecting commerce as defined in the Labor Management Relations Act of 1947 (Section 301(a); see *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448; *Teamsters Local* v. *Lucas Flour Co.*, 369 U. S. 95, 101 et seq.; *Black-Clawson Co., Inc.* v. *International Ass'n of Machinists*, 313 F. 2d 179, 181-182 (2d Cir. 1962)—we need say no more than that *our decision would be the same whether Federal or State law governs*," 13 N. Y. 2d at 585, fn. 2. (Emphasis added.)

State Marine Line v. *Crooks* was decided on November 27, 1963, two months before the Appellate Division unanimously affirmed the New York Supreme Court's decision denying petitioner's motion to vacate the award and six months before the New York Court of Appeals denied petitioner's leave to appeal.

The State and Federal policy of settling industrial disputes by grievance machinery and arbitration rather than in the courts can only be upheld by a strict adherence to the rule of finality of an arbitrator's award. The fact that an occasional award may be unusual and even offensive to some is a necessary corollary and subordinate to the more important policy of permitting the settling of labor disputes by arbitration. This policy "would be undermined if the courts had the final say on the merits of the awards." *Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593, 596 (1960).

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* *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448 (1955); *Teamsters* v. *Lucas Flour Co.*, 369 U. S. 95 (1962).

Thus it is not material whether New York State law or Federal law was the basis for the decision below, since they are consistent with each other and would require the same result.*

2. There is no important question of Federal law.

The refusal of the State Court to vacate the arbitration award here, unfair as it may seem to petitioner, involves an unusual *sui generis* factual situation and does not raise any important question of Federal law. This is one of the many thousands of arbitration awards where understandably a disappointed litigant seeks relief from the court because of his disagreement with the decision on the merits. The fact that an award may seem to be harsh or inequitable does not under both the New York State and the Federal rule require or permit the court to review the merits of the dispute. Were either the State or the Federal judicial forum be made available so that the courts would substitute their judgment for the judgment of arbitrators, the courts would be inundated with cases

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* Had the petitioner initiated this action to vacate the award relying on Section 301 of the Labor-Management Relations Act, respondent would then have had as a complete defense to the action that the agreement does not embrace "employees" within the meaning of such provision since the licensed marine engineers covered by the agreement were "supervisors". Respondent would have necessarily been given an opportunity, if found necessary, to submit evidence to the Court on that defense. In *Bull Steamship Co.* v. *National Marine Engineers' Beneficial Association*, 250 F. 2d 332 (2d Cir.) cert. denied, 355 U. S. 932 (1958), the Second Circuit recognized the validity of such a defense by its statement:

> "[I]t appears quite likely that the court below has no jurisdiction under Section 301 of the Taft-Hartley Act, 29 U. S. C. Section 185, for the supervisory status of the MEBA employees of Bull is well established in the pleadings, affidavits and briefs below."

each of which would require a detailed examination of the evidence before the arbitrator and a determination by the court as to whether the arbitrator's award is warranted under the particular circumstances. This would run counter to the Federal and New York State labor policy to encourage final disposition of labor disputes, through the arbitration process.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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